

State of South Dakota

EIGHTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2009

808Q0592

HOUSE JUDICIARY ENGROSSED NO. **HB 1166** -
2/23/2009

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

Introduced by: Representatives Deadrick, Cutler, Gosch, and Lust and Senators Heidepriem, Abdallah, and Vehle

1 FOR AN ACT ENTITLED, An Act to provide for DNA testing for certain inmates for the
2 purposes of determining whether they may have been wrongfully convicted.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Upon a written motion by any person who has been convicted of a felony offense,
5 the court that entered the judgment of conviction for the felony offense shall order DNA testing
6 of specific evidence if the court finds that all of the following apply:

7 (1) The petitioner asserts, under penalty of perjury, that the petitioner is actually innocent
8 of the felony offense for which the petitioner is under a sentence of imprisonment or
9 death;

10 (2) The petitioner's conviction is final under chapter 23A-32;

11 (3) The petitioner has exhausted any claim for relief under chapter 21-27 or 28 U.S.C.
12 § 2254;

13 (4) The specific evidence to be tested was secured in relation to the investigation or
14 prosecution of the felony offense for which the petitioner was convicted;



- 1 (5) The specific evidence was either:
 - 2 (a) Not previously subjected to DNA testing and the petitioner did not:
 - 3 (i) Knowingly and voluntarily waive the right to request DNA testing of
 - 4 that evidence in a court proceeding after the date of enactment of this
 - 5 Act; or
 - 6 (ii) Knowingly fail to request DNA testing of that evidence in a prior
 - 7 petition for relief under chapter 21-27 or 28 U.S.C. § 2254; or
 - 8 (b) Previously subjected to DNA testing and the petitioner is requesting DNA
 - 9 testing using a new method or technology that is substantially more probative
 - 10 than the prior DNA testing;
- 11 (6) The petitioner shows good cause for the failure to request DNA testing of the specific
- 12 evidence at the time of trial;
- 13 (7) The specific evidence to be tested exists, is in the possession of the state, and has
- 14 been subject to a chain of custody and retained under conditions sufficient to ensure
- 15 that such evidence has not been substituted, contaminated, tampered with, replaced,
- 16 or altered in any respect material to the proposed DNA testing;
- 17 (8) The proposed DNA testing is reasonable in scope, uses scientifically sound methods,
- 18 and is consistent with accepted forensic practices;
- 19 (9) The petitioner identifies a theory of defense that:
 - 20 (a) Is consistent with an affirmative defense presented at trial; or
 - 21 (b) Would establish the actual innocence of the petitioner of the felony offense
 - 22 referenced in the petitioner's assertion under subdivision (1); and
- 23 (10) If the petitioner was convicted following a trial, the identity of the perpetrator was
- 24 at issue in the trial.

1 Section 2. Upon the receipt of the petitioner's written motion filed under section 1 of this
2 Act, the court shall:

3 (1) Notify the attorney general and the state's attorney who prosecuted the case resulting
4 in the petitioner's conviction; and

5 (2) Allow the state twenty days from the receipt of notice to respond to the motion.

6 Section 3. The court may not appoint counsel for an indigent petitioner under this Act.
7 However, the court may refer requests for DNA testing to the Innocence Project in South Dakota
8 or such volunteer attorney as the State Bar of South Dakota may designate.

9 Section 4. Nothing in this Act precludes a petitioner from proceeding with privately retained
10 counsel.

11 Section 5. Upon receiving notice from the court that a written motion has been made, the
12 attorney general or the state's attorney who prosecuted the case, shall take all reasonable actions
13 necessary to ensure that all evidence which was collected in connection with the investigation
14 or prosecution of the case, and which remains in the actual or constructive custody of the state
15 or any of its political subdivisions, is preserved pending completion of the proceedings under
16 this Act.

17 Section 6. The court shall direct that any DNA testing ordered pursuant to section 1 of this
18 Act be carried out by the South Dakota Division of Criminal Investigation. However, the court
19 may order DNA testing by another qualified laboratory if the court makes all necessary orders
20 to ensure the integrity of the specific evidence and the reliability of the testing process and test
21 results.

22 Section 7. Nothing in this Act prohibits a convicted person and the state from consenting
23 to and conducting post-conviction DNA testing by agreement of the parties, without filing a
24 motion for post-conviction DNA testing pursuant to this Act.

1 Section 8. The results of any DNA testing ordered pursuant to section 1 of this Act shall be
2 disclosed to the court, the petitioner, and the state.

3 Section 9. The state shall submit any test results relating to the DNA of the petitioner to the
4 State DNA Database.

5 Section 10. If the DNA test results obtained pursuant to this Act are inconclusive or show
6 that the petitioner was the source of the DNA evidence, the DNA sample of the petitioner shall
7 be retained in the State DNA Database.

8 Section 11. If the DNA test results obtained pursuant to this Act exclude the petitioner as
9 the source of the DNA evidence, and a comparison of the DNA sample of the petitioner results
10 in a match between the DNA sample of the petitioner and another offense, the attorney general
11 shall notify the appropriate agency and preserve the DNA sample of the petitioner.

12 Section 12. If DNA test results obtained pursuant to this Act are inconclusive, the circuit
13 court shall deny the petitioner relief.

14 Section 13. If DNA test results obtained pursuant to this Act show that the petitioner was
15 the source of the DNA evidence, the court shall:

16 (1) Deny the petitioner relief; and

17 (2) On motion of the state:

18 (a) Assess the petitioner the cost of any DNA testing carried out pursuant to this
19 Act; and

20 (b) Order that the finding be forwarded to the South Dakota Board of Pardons and
21 Paroles so that the board may consider the finding in reviewing any
22 subsequent parole application submitted by the petitioner.

23 Section 14. In any prosecution of the petitioner pursuant to this Act for false assertions or
24 other conduct in proceedings pursuant to this Act, the court, upon conviction of the petitioner,

1 shall sentence the petitioner to a sentence that runs consecutively to any other term of
2 imprisonment the petitioner is serving.

3 Section 15. If DNA test results obtained pursuant to this Act exclude the petitioner as the
4 source of the DNA evidence, the petitioner may file a motion for a new trial. The court shall
5 establish a reasonable schedule for the petitioner to file such motion for a new trial and for the
6 state to respond to the motion for a new trial.

7 Section 16. The court shall grant the motion of the petitioner for a new trial if the DNA test
8 results, when considered with all other evidence in the case, establish by compelling evidence
9 that a new trial would result in the acquittal of the felony offense, as referenced in section 1 of
10 this Act, for which the petitioner is under a sentence of imprisonment.

11 Section 17. Nothing in this Act provides a basis for relief in any state or federal habeas
12 corpus proceeding.